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STATE CAPITOL  
PHOENIX, ARIZONA

October 11, 1974

DEPARTMENT OF LAW LETTER OPINION NO. 74-26-L (R-50)

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REQUESTED BY: ROBERT A. JANTZEN  
Director  
Arizona Game and Fish Department

QUESTION: May the Arizona Game and Fish Department participate with the United States Government under the new provisions of the Endangered Species Act of 1973 (Public Law 93-205)?

ANSWER: See body of opinion.

Under the provisions of the Endangered Species Act of 1973 (Public Law 93-205), fish or wildlife have been defined in Section 3(5) as:

. . . [A]ny member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, anthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

A.R.S. § 17-101.A.17 defines wildlife to include in its definition all the items contained in the federal definition with the exception of anthropods and other invertebrates. The Game and Fish Department therefore had authority to administer laws relating to all wildlife with reference to the Endangered Species Act except anthropods and other invertebrates.

Under Section 6 of the Endangered Species Act regarding cooperation with the State, authority is granted to the federal government to enter into cooperative agreements with the State. This cooperative agreement is for the purpose of State action providing for the conservation of endangered or threatened species within that state and providing a financial system of assistance. However, prior to entering into the agreement with any state, the Secretary of the Interior must find and annually confirm the following:

1. Authority resides in the state agency to conserve resident species of fish or wildlife determined by the state agency or the Secretary to be endangered or threatened;

2. The state agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or wildlife in the state which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information and data requested to the Secretary;

3. The state agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;

4. The state agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered species or threatened species; and

5. Provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened.

With reference to Item 1 of Section 6, A.R.S. § 17-231.B.7 authorizes the Game and Fish Commission to "enter into agreements with the federal government . . . for management studies, measures, or procedures for or relating to the preservation and propagation of wildlife, and expend funds for carrying out such agreements."

Item 2 of Section 6, on whether or not the Game and Fish Department has established acceptable conservation programs, is a determination which can only be made by the Secretary upon examination of the activities of the Arizona Game and Fish Department and the program and the professional competency of the employees. We believe, under A.R.S. § 17-231.A.2, the Commission has the authority to establish broad policies and long range programs for the management, preservation and harvest of wildlife. Under A.R.S. § 17-231.B.1, the Commission has authority to "conduct investigations, inquiries

or hearings in the performance of its powers and duties." Therefore, it appears that the Arizona Game and Fish Department has the full authority to comply with Item 3 of Section 6 above.

Under A.R.S. § 17-231.B.3, the Commission has authority to "construct and operate game farms, fish hatcheries, fishing lakes, or other facilities for or relating to the preservation or propagation of wildlife." Under A.R.S. § 17-241.A.2, the Commission has authority to "acquire by purchase, lease, exchange or gift lands or waters for use as fish hatcheries, game farms, shooting areas, firing ranges or other purposes necessary to carry out the provisions of this title." Therefore, it appears that the State has full authority to comply with Item 4 of Section 6 above.

Under A.R.S. § 17-231.A.1, the Commission shall "make rules and regulations and establish services it deems necessary to carry out the provisions and purposes of this title." All rules and regulations must be adopted pursuant to A.R.S. §§ 41-1001, et seq., which is the State Administrative Procedures Act. Under A.R.S. § 41-1002, notice of the proposed adoption of any such rules or regulations is required to be filed and a public hearing must be held on a date and time designated in such notice by the agency adopting the rules, and the agency must afford any interested person, his duly authorized representative, or both, an opportunity to present statements, arguments or contentions relating to the proposed rules or regulations. This presentation may be required to be in writing although most agencies, including the Game and Fish Department, historically have permitted oral discussions of proposals on rules prior to adoption. Therefore, it appears that the Game and Fish Department can fully comply with Item 5 of Section 6, as indicated above.

After complete review of the Endangered Species Act of 1973 and the statutes, it appears that the only way the Game and Fish Department, under existing state statutes, would not be able to comply with the Endangered Species Act of 1973 is if the Secretary of the Interior would designate amphipods or other invertebrates an endangered species within the State of Arizona.

Respectfully submitted,

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The Attorney General